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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRY LEROI HARRIS,

Defendant and Appellant.

C051222

(Super. Ct. No. 04F07863)

A jury convicted defendant Kerry Leroy Harris of corporal abuse of a cohabitant and assault with a deadly weapon with enhancements.

Sentenced to nine years in state prison, defendant contends on appeal the trial court abused its discretion in denying a continuance during trial so that the defense could attempt to obtain a statement from a potential witness; abused its discretion in excluding certain medical evidence related to the victim's child; and committed judicial misconduct by improperly "scolding" the recanting victim for violating in limine orders,

and allowing the prosecution to tell the jury that she failed to obey court orders to appear for trial.

None of these contentions has merit. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

When he responded to a 911 call one night in September 2004, Sacramento County Sheriff's Deputy Martin Dighero found the victim, Heidi M., at her neighbor's house, scared and crying. Heidi's eye was bruised, her lower lip was swollen and looked like it had been bleeding recently, and she had a knife wound on her left forearm.

Heidi told Deputy Dighero that defendant had struck her in the face several times, cut her with a kitchen knife, and threatened to kill her. Defendant is the father of Heidi's seven-year-old son and the child she was then expecting.

Deputies recovered a knife from Heidi's kitchen sink which she identified as the weapon used by defendant. There was blood on the bathroom floor, wall, bathtub and sink.

After the assault, Heidi recanted, tried to get the case dismissed, and told a neighbor she received the cut on her arm from hitting a window.

Defendant was arrested and ultimately charged with inflicting corporal injury upon a cohabitant (Pen. Code,

§ 273.5, subd. (a)),¹ and assault with a deadly weapon (§ 245, subd. (a)(1).) It was also alleged defendant had prior convictions for inflicting corporal injury on a cohabitant (the same victim as in the current case) and battery.

At trial, the jury heard the tape of the 911 call from Heidi's neighbor.

Evidence at trial established that defendant had assaulted Heidi several times over the past six years. Officers testified that Heidi reported in July 1998 that defendant stunned her with a blow to the back. In March 1999, she reported that defendant slapped her in the face and cut her lip, an injury observed and photographed by the officers; those photographs were shown to the jury. In May 1999, she reported defendant slapped her face, choked her, and screamed at her; officers observed and photographed Heidi's injuries, and those photographs were shown to the jury. In July 2000, she reported to police that defendant had punched her head and torso with his fists, screamed at her, hit her in the head with the telephone, slammed her head into a chain-link fence, and choked her; her injuries were observed and photographed by officers, and those photographs were shown to the jury. Heidi recanted soon after reporting the July 2000 assault and attempted to drop charges against defendant.

¹ Undesignated statutory references are to the Penal Code.

A witness to the July 2000 altercation testified he saw Heidi running from a Black man and screaming; her assailant grabbed her by the hair and by the throat, and hit her.

Testifying about the current charges, Heidi declared she lied when she told police that defendant injured and threatened her. Instead, Heidi explained, she received the injuries shown to police when she "got into a fight" with a woman who came to her door looking for defendant. Heidi thought the woman's name was "Sied" (*sic*), although Heidi was "not sure" of her name, could not recall the woman's height, weight, or clothing, or whether she wore glasses. Enraged by the thought that the woman might have been in the house with defendant while Heidi and her son were out of town, Heidi testified she and the woman were "pushing and grabbing," "pulling hair [and] punching" and Heidi "felt something sharp hit [her] arm."

Heidi also recanted her reports of prior abuse by defendant. She denied telling police in July 1998 that defendant had struck her (or, if she did, "it was a lie"); denied reporting to police in March 1999 that defendant had cut her lip with a slap to the face and called her "a worthless Bitch"; and denied telling police in May 1999 that defendant slapped her face, threatened her, choked her, and told her she was "good for nothing." She also denied calling police in July 2000 because defendant had attacked her outside in front of the neighbors, punched her with his fist, threw the portable phone at her head, and choked her. To the contrary, Heidi explained,

she got the injury to her lip shown in police photographs when she "got into a fight with a Bitch that came to [her] door" asking for defendant, and the woman hit her.

Rather, Heidi testified, each time she "called the police on defendant," she "made up a lot of lies to get [defendant] into trouble" and "did a lot of things out of jealousy" because she was under a lot of stress.

In response to defense counsel's questioning, Heidi admitted having physically attacked two women in 1997 with whom defendant was or had been involved. She punched one woman in the eye until she fell down, and forced another woman's car off the road after she saw defendant riding in it.

The jury convicted defendant of both of the 2004 charges against him.

DISCUSSION

I. Denial of Continuance During Trial

On the morning of the 10th day of trial, just before the prosecutor finished his case in chief, defense counsel announced to the court that she had spoken very briefly by phone for the first time that morning with a woman named Syed "Fairfield,"² who recalled having an altercation with Heidi at defendant's house. Syed did not tell counsel the date of the alleged altercation, and counsel indicated she "did not ask any additional questions

² The last name of the woman counsel mistakenly referred to as "Fairfield" is in fact named Bairfield.

other than to verify" the woman's name and telephone number. Counsel asked for a "brief continuance" so the defense investigator could take a detailed statement from Syed, stated that defendant did not know her last name until today; defendant's friend had fortuitously "r[u]n into Syed over the weekend," gotten her number, and given it to defendant. The prosecutor objected to the untimely disclosure of a new defense witness. (§ 1054.3.)

Given the prior trial delays, the court asked "exactly what efforts were made to find this woman before now and why she miraculously turns up today. It's hard to believe that this couldn't have happened earlier." The court denied the request for a continuance, but said, "I'll let you make one more phone call, but she needs to be here this morning."

After the last two prosecution witnesses testified, the court gave defense counsel five more minutes to attempt to reach Syed by phone, and said, "I'm going to want to know what efforts, if any, were made before now to locate this witness, Syed; how is it that [defendant's friend] just ran into her; when did he run into her; how did he run into her; how is it that nobody knew her last name until now; what exactly is her anticipated testimony; where is she now; [and] where is [defendant's friend] now."

When the discussion continued a few minutes later, defense counsel announced that defendant had spoken to Syed by phone, who stated she was on her way to court. Counsel stated she had

been unable to reach defendant's friend, and so could provide no details about how he contacted Syed, except that he recently saw her at a club. According to counsel, defendant "had never been to [Syed's] house" and had "been trying to obtain information on Syed" but "has been unable to do so until now." Counsel requested a "brief" continuance of a few hours over the lunch break to "look into it."

The prosecutor again objected, pointing out that Heidi testified at the preliminary hearing five months earlier that the person who inflicted her injuries was a woman named "Sieb" (*sic*), whose "caller ID" Heidi had seen on defendant's telephone before the assault.

The court then denied defendant's request for a continuance: "It's been clear from the very beginning, even before the preliminary hearing, that the whole defense was that Heidi [M.] got in a fight with someone coming to see [defendant], that was something within [defendant's] knowledge all along as to who that person was. It's still speculative, in my view, as to whether this person even exists or what she would say.

"As the prosecution just pointed out, Miss [M.] testified that this person, whoever it was that came to the door, kept calling and that Miss [M.] herself had called her back, so she would have had a phone number.

"I think there's been an insufficient showing that the defense, not [counsel] personally, but the defense that she

represents, made reasonable and good faith efforts to locate their witness in a timely fashion.

"There's insufficient information as [to] why this witness could not have been located earlier. There's still an insufficient offer of proof of her anticipated testimony.

"I would also point out that when Miss [M.] testified here in court, she said she thought it was Syed, and then somebody told her it wasn't Syed. We still have no address, no date of birth.

"I think that there's an insufficient showing of good cause. Request for a continuance would be denied."

The defense then rested.

After the prosecutor began his closing argument, defense counsel informed the court that Syed had arrived in court. The court excused the jury for a lunch break and the court and counsel met with Syed. The court asked her to verify her name, address and phone number. The court informed Syed that counsel wanted to talk with her and said that she was excused. After speaking to counsel, closing arguments resumed and were completed; the jury was instructed; and it returned guilty verdicts without any further request by counsel for the court to allow Syed's testimony.

On appeal, defendant contends the trial court abused its discretion in "not allowing [Syed] to testify and by denying the defense a brief, lunchtime continuance so an investigator could

take [Syed's] statement" because her testimony "would have exculpated" defendant.

The record simply does not support defendant's suggestion on appeal that the trial court denied a request by defendant that Syed be permitted to testify. After the court and counsel met with Syed during the lunch break, no such express request for Syed to testify appears in the record.

We review a ruling on a motion for a continuance for an abuse of discretion. (*People v. Wilson* (2005) 36 Cal.4th 309, 352; *People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172 (*Howard*).) In order to show the court abused its discretion in denying a continuance in the midst of trial, the defendant must demonstrate all of these things: "that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*Howard*, at p. 1171; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1036.)

Under this standard, defendant's attempt to demonstrate good cause for a continuance was deficient in two respects: First, defendant did not show he exercised due diligence in securing the witness's attendance. Before trial, he had Syed's telephone number in his cell phone, but he did not say he had made attempts to reach her, or when those attempts had been made. Although counsel represented that defendant had "never

been to [Syed's] house," she did not say defendant did not know where Syed lived. Second, defendant failed to show that Syed's potential testimony about an altercation with Heidi at defendant's house pertained to the assault at issue in this trial; Syed did not give the date of the alleged altercation, and Heidi testified she had twice fought at defendant's house with a perceived romantic rival.

Nor did the court's ruling on defendant's request for a continuance deny him his federal constitutional rights to due process. "[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" (*Howard, supra*, 1 Cal.4th at pp. 1171-1172.)

Additionally, we do not consider the declaration that Syed submitted, in support of defendant's motion for a new trial, in evaluating the court's decision denying a continuance. We note however, that Syed's posttrial declaration does not show that her testimony would have necessarily assisted defendant: Syed does not indicate the date on which she states Heidi initiated an unprovoked attack, or the address where it took place; she denies that she struck Heidi; and denies having any weapon. Syed's posttrial declaration also states defendant called her during trial for reasons other than asking her to testify,

contradicting counsel's suggestion in the trial court that defendant did not know how to contact her.

Therefore, defendant did not show that he had been diligent in securing the witness's attendance, or that the witness would say something material to the defense. "Under [such] circumstances, '[g]iven the deference necessarily due a state trial judge in regard to the denial or granting of continuances,' the court's ruling does not support a claim of error under the federal Constitution." (*Howard, supra*, 1 Cal.4th at p. 1172.)

II. Medical Evidence Related to Victim's Child

Heidi's young son with defendant was seriously ill with leukemia at the time of the assault, had endured a bone marrow transplant, and continued to require extensive and costly medical attention thereafter, up to and including the time of trial.

The court granted the prosecution's in limine motion to exclude evidence about the precise nature and severity of the illness suffered by Heidi's son, and to exclude any reference to the current state of the boy's health, on the grounds of relevance and prejudice. Accepting the defense argument that the stress suffered by Heidi on account of her son's illness was relevant to the defense theory that Heidi was motivated to fabricate claims against defendant, the court ruled admissible evidence that the son was ill at the time of the assault,

requiring Heidi to accompany him to Stanford University Hospital for medical attention.

On appeal, defendant contends the court prejudicially erred in excluding evidence that his son with Heidi was, at the time of the charged assault, being treated for leukemia and had undergone a bone marrow transplant.

Challenges to the exclusion of this evidence as either irrelevant or unduly prejudicial are analyzed under an abuse of discretion standard. (Evid. Code, § 352; see *People v. Harris* (2005) 37 Cal.4th 310, 337.) A trial court's ruling on the admissibility of evidence will not be disturbed on appeal unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42.)

There was no abuse of discretion. The defense was permitted to, and did, introduce evidence that the child was very ill at the time of the attack, and that Heidi became upset with defendant during her lengthy hospital stay with the child preceding the assault because he did not visit more often, and was seeing other women. Defendant has not shown how the child's precise diagnosis and the exact treatment protocol were relevant.

Nor did the exclusion of the child's diagnosis and treatment protocol inhibit defendant from advancing the theory that "[Heidi's] severe stress in dealing with her son's serious medical condition, while knowing that [defendant] was cheating

on her, exacerbated [her] already volatile character [and] caus[ed] her to commit unprovoked, violent attacks on other women," one of whom allegedly caused the injury defendant was charged with inflicting. Heidi's testimony sufficiently disclosed that her son was severely ill: She testified without objection that, at the time of the charged assault, she and her son had recently returned from a four-month stay in the hospital in Palo Alto, that her son "had no blood counts, no white blood cells at all" and that she was angry when defendant left the house with the boy after the assault because her son "wasn't hooked up to his IV and [she] knew that [defendant] didn't know how to take care of it." This testimony was sufficient to permit the jury to find Heidi was under severe stress.

There was no abuse of discretion.

III. Alleged Judicial Misconduct

Finally, defendant contends the trial court committed reversible error by improperly "scold[ing] [Heidi] in front of the jury, thereby damaging her credibility," and allowing the prosecution to tell the jury that Heidi violated a court order.

Although defendant fails to cite to the record or identify precisely the incidents he asserts constitute judicial misconduct, we interpret his arguments as referring to events following Heidi's (1) failure to obey court orders to appear for trial; and (2) failures to abide by the court's in limine order that she not refer to the current state of her son's health.

Article VI, section 10 of the California Constitution provides, in pertinent part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." The California Supreme Court has interpreted this provision to require that such comment "be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." [Citations.] Thus, a trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict.' [Citation.] 'We determine the propriety of judicial comment on a case-by-case basis.'" (*People v. Monterroso* (2004) 34 Cal.4th 743, 780; *People v. Cash* (2002) 28 Cal.4th 703, 730.)

Heidi's Failure to Appear

The prosecutor scheduled Heidi to be the first witness. She did not appear as ordered on April 27, 2005, day five of trial. Defendant stated Heidi was not present because she was at home taking care of their ill son; defense counsel stated that the boy had a medical procedure scheduled the following day. A bench warrant was issued and stayed to May 3, and then again to May 4.

On the morning of May 4, day seven of trial, both defendant and Heidi failed to appear. Outside the presence of the jury,

the court stated: "I feel that I have been misled repeatedly. They told me on Monday surgery was scheduled for yesterday, Tuesday, and clearly it was not. [¶] There will be no further delays." The parties then discussed in limine motions, and the court gave the jury preliminary instructions.

When the prosecution was ready to begin opening statements and Heidi still had not appeared, the court allowed the prosecutor (over defense counsel's objection) to indicate in opening statements that Heidi had been ordered to court and had not appeared. The prosecutor said: "Now, normally during the course of the trial or the opening statements rather, I'd give you a little bit of an outline as to how the evidence is going to come in and how the case is going to go, right, so you're prepared to--observe it in a more organized fashion. [¶] I don't know that Miss [M.] is going to testify as to how she received her injuries on the night of September 6th, 2004. [¶] I do know and the evidence will show that she's still together with defendant, that she still has the child with him, that she still loves him and that she has requested that this case be dismissed. [¶] It's also the case that Miss [M.] was ordered to be present this morning in court at nine a.m. [¶] It's also the case that to my knowledge she's not here yet. [¶] I don't know what she will say exactly about her injuries and I can't promise you that she'll show up. All I can say is that she was ordered by the Court to be here and she's failed to be here."

Allowing the prosecutor to state that Heidi had failed to appear, in contravention of a court order, was not error. It was, rather, an appropriate response to Heidi's unlawful action and, "because the comments did not discredit the defense theory or create an impression that the court was allying itself with the prosecution," it does not constitute judicial misconduct. (*People v. Chong* (1999) 76 Cal.App.4th 232, 244.)

Heidi's Violations of In Limine Orders

Before she testified, Heidi was informed by the court of its in limine rulings, and told (among other things) that she was not to mention her son's "hospitalizations or medical appointments" after September 2004. During this exchange, she interrupted and argued with the court, and the court found her to be hostile to the court and to the prosecution.

But Heidi apparently could not resist referring during testimony to the court's in limine rulings.

Asked about her July 1998 police report that defendant struck her, she responded she could not recall what she had said seven years ago because "I've been through a lot for reasons that I'm not allowed to discuss with the Court."

Asked next whether she was living with defendant at the time of her March 1999 police report, the following exchange took place:

"[HEIDI]: No. We weren't actually for reasons why I'm not allowed to tell the Court because it was stricken from the record.

"[PROSECUTOR:] Were you--

"THE COURT: Stop saying that. That's not true. I'm going to have to tell the jury the truth here.

"[HEIDI]: I'm just saying I'm not allowed to tell why we're not together, why we're not together at that time. I'm not allowed to tell it or I'll be held in contempt.

"THE COURT: That's not the ruling of the Court.

"[HEIDI]: If I say it I'll be in trouble."

Next asked whether defendant was home with her when she made her May 1999 police report of abuse by defendant, Heidi responded, "I can't remember for reasons I'm not allowed to say," and the court directed the jury to "[p]lease disregard that comment."

At the break, the court cautioned Heidi that the next time she referred in testimony to "reasons I'm not allowed to say" or tried to testify about things excluded by the court's orders, the court planned to instruct the jury that: "[t]he court has previously instructed and specifically ordered the witness, Miss [M.], not to mention certain subjects because they are irrelevant, and the purpose is intended to arouse your sympathies and emotions, and [I shall] instruct the jury that they're not to be influenced by sentiment, conjecture, sympathy,

passion, prejudice, public opinion or public feeling. [¶] And further, that [the jury] may consider a person's direct and intentional disregard of a Judge's order as a factor in assessing her credibility. [¶] And further, that the witness has demonstrated a total and intentional disregard of this Court's ruling and order."

Just before the conclusion of her testimony, Heidi received a cell phone call while testifying and said, "I think that's the play room calling me for my son. They're closing right now. I'm worried about my son." The court then instructed the jury that "there's no cause for the witness to be worried about her son, and she's been instructed to stop mentioning that and she continues to defy this court's order."

When, minutes later, Heidi responded, "Right now I'm really having a hard time thinking. . . . It just seems like the Court doesn't have any concern for the health of my family," the court stated: "All right. I'm now going to instruct you to disregard that comment. It's going to be stricken from the record. And the court has previously ordered this witness to stop making comments of that nature and not to mention these subjects because they are irrelevant and they are intended to arouse your sympathies and emotions. You are not to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. I find this witness is directly violating a direct order of this Court and has demonstrated a

total, intentional disregard for this Court's rulings. You may consider that in evaluating her credibility."

Defendant contends on appeal this instruction was error.

The Attorney General asserts, at the outset, that defendant failed to preserve this issue for review by interposing a timely objection to the court's comments. We agree. (*People v. Boyette* (2002) 29 Cal.4th 381, 459.) Defendant has shown neither that an objection would have been futile nor that a timely admonition would have failed to cure any harm.

Even assuming the claims had been preserved, however, the circumstances establish that the court's comments did not undermine the fairness of defendant's trial. The comments did not withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or usurp the jury's ultimate factfinding power. (Cf. *People v. Monterroso*, *supra*, 34 Cal.4th at p. 780.) There was no pattern of judicial misconduct that discredits the defense or creates the impression the court is allying itself with the prosecution. (Cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1207.) "[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. Snow* (2003) 30 Cal.4th 43, 78.) Neither the court's responses

to Heidi's mischaracterization of the in limine orders nor its instruction denied defendant a fair trial.

Finally, we note that the trial court instructed the jury in accordance with CALJIC No. 17.30 that none of the court's statements should be understood to "intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness." Defendant offers no reason to believe the jury failed to follow this instruction. (*People v. Chong, supra*, 76 Cal.App.4th at pp. 244-245.)

DISPOSITION

The judgment is affirmed.

_____, BUTZ, J.

We concur:

_____, SIMS, Acting P. J.

_____, CANTIL-SAKAUYE, J.